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No. 08-1450

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LAVON JONES, JR.,

*Petitioner,*

*v.*

BAYER HEALTHCARE LLC,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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Petitioner, Lavon Jones, Jr., wishes to respond briefly to statements and arguments made by Respondent in its opposition to the grant of certiorari.

## I.

## In Light of the Pervasive Factual Disputes in This Case, the Grant of Summary Judgment Was In Error

A comparison of the statements of fact in the Petition for Writ of Certiorari with those in he Brief in Opposition demonstrates that virtually every material fact was in dispute in the district court.[1] Thus, with regard to the circumstances surrounding petitioner's termination, the Respondent ignores or attempts to minimize the facts as presented by Petitioner that he neither abandoned his job on January 24, 2003, without authorization nor falsified records with regard to the replacement of filters, the two reasons given for his termination. Respondent takes the position that the conflicts in testimony between Bayer personnel as to crucial events in the sequence that led to the termination were insignificant, a judgment that it was up to the jury to make or reject.

Respondent also claims that Petitioner had an "extensive history" of interpersonal and performance problems at Bayer, but only cites one so-called "example" that occurred *before* Petitioner fought his way into the all-white enclave in the HVAC

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[1]Of course, since Petitioner is the non-moving party, the courts below on the motion for summary judgment were required to accept his version but obviously refused to do so. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

department. That one "example" (see, page 4 of the Brief in Opposition), was not one of "numerous incidents" but in fact was one *instance* in which Petitioner himself took the initiative of going to Human Resources and achieving a satisfactory resolution of an issue precipitated by another worker.[2] The only other pre-HVAC instance cited below by Bayer was another instance of Petitioner initiating an intervention by Human Resources in order to resolve satisfactorily an issue with one of his supervisors.[3] Neither of these two incidents – the only pre-HVAC ones – were the basis for any discipline. It was only when Bayer attempted to justify its retaliatory firing of Petitioner that they were dredged up from his personnel file.

The examples cited by Respondent after Petitioner was taken into HVAC also involved disputed facts. Thus, Petitioner's so-called "rocky probationary period" was caused, according to Petitioner, by hostility towards him by his white co-workers. Nevertheless, his performance was more than satisfactory and, after he took the initiative once again, he was promoted because his work, according to his supervisor, fully justified a promotion. Petition for Writ of Certiorari, pp. 9-10. Respondent also states, as if undisputed, that Petitioner had a "loud profane altercation" with a co-worker, completely overlooking the facts that Petitioner denied

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[2]Declaration of Michael Timberlake in Support of Opposition to Motion for Summary Judgment, p. 2, ¶¶ 5 and 6; 8-10. ER 495. Declaration of Lavon Jones, Jr., p. 3, ¶ 4. ER 453-54.

[3]Declaration of Lavon Jones, Jr., p. 3, ¶ 5. ER 454.

using profane or loud language and there was never any resolution as to what occurred. [4]

This and one other example were the only criticisms made by Bayer until *after* Petitioner filed charges of discrimination internally and with the EEOC. Moreover, it was only after the EEOC had rejected Petitioner's claims in December, 2002, that the sequence of actions that culminated in Petitioner's discharge were taken by Bayer in January, 2003. It was less than a month between Petitioner filing a grievance that accused his supervisor of retaliation and the actions of his supervisor – including taking part in a meeting at which Petitioner was verbally abused for having filed charges of discrimination – that led to Petitioner's being fired.

Of course, and with all due respect, it is not the role of this Court, any more than it was the role of the district court or the court of appeals, to resolve the factual disputes between the parties or, indeed, to determine what did or did not occur. Under Title VII and the Seventh Amendment to the Constitution of the United States, Petitioner was and is entitled to have the issues of fact determined by a jury. It is the denial of that right by the improper use of summary judgment that requires review by the Court.

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[4]Declaration of Lavon Jones, Jr., p. 7, ¶ 20. ER 458.

## II.

## THE QUESTION OF THE WIDESPREAD AND DISPROPORTIONATE DISPOSITION OF EMPLOYMENT DISCRIMINATION CASE THROUGH SUMMARY JUDGMENT IS AN IMPORTANT ONE THAT SHOULD BE EXAMINED BY THIS COURT

Petitioner has set out in some detail the results of recent studies that demonstrate that the use of summary judgment motions to dispose of claims of employment discrimination has become standard operating procedure by defendant employers.[5] To repeat, Petitioner is not claiming that the use of summary judgment in such cases *per se* violates the Seventh Amendment. However, when, as has been noted repeatedly by commentators, over a period of time summary judgment is granted far more often in such cases than in any other category of cases, exercise by this Court of its supervisory powers over the lower federal courts is both warranted and necessary.

In 1991, when Congress extended the scope of Title VII to permit the recovery of money damages for the first time, it did so with full awareness of the right to jury trial that attached. It made the conscious policy decision to place the determination of the merits of such claims in the hands of juries, and not judges. In particular, in cases where there were factual disputes "the elusive factual question of intentional

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[5]*See*, the Petition for Writ of Certiorari at pp. 19-22 and authorities there cited.

discrimination"[6] was to be left to juries. For, as this Court has recognized, the "question facing triers of fact in discrimination cases is both sensitive and difficult".[7]

As this Court held in *Curtis v. Loether*, 415 U.S. 189 (1973), the right to a jury trial to determine these elusive, sensitive, and difficult facts applies with full force to civil rights cases brought to enforce policies of the highest importance to our society. This case presents an ideal opportunity to reiterate the importance of the Seventh Amendment and to ensure that the lower federal courts decide whether to grant motions for summary judge with full awareness of its implications and requirements.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully Submitted,

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[6] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1981)

[7] *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

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